

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 29, 2001

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

STAR SAND COMPANY, INC.

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Docket No. CENT 2000-437-M
A.C. No. 41-03153-05517

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Beatty, Commissioner

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On December 18, 2000, Chief Administrative Law Judge David F. Barbour issued an Order of Default to Star Sand Company, Inc. ("Star Sand") dismissing this civil penalty proceeding for failing to answer the Petition for Assessment of Penalty filed by the Secretary of Labor on September 20, 2000, or the judge's Order to Respondent to Show Cause issued on November 8, 2000. The judge assessed civil penalties in the sum of \$800 proposed by the Secretary.

On January 16, 2001, the Commission received from Star Sand a request to vacate the judge's default order. Mot. In its request, Star Sand contends that it failed to file an answer when it received the Secretary's Petition for Assessment of Penalty in this proceeding because it mistakenly believed that this case was included in the group of cases that it was in the process of settling at that time. *Id.* It requests that the Commission reopen this case. *Id.* The Secretary does not oppose Star Sand's request.

The judge's jurisdiction in this matter terminated when his decision was issued on December 18, 2000. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R.

§ 2700.70(a). We deem Star Sand's motion to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

On the basis of the present record, we are unable to evaluate the merits of Star Sand's position. In the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See Valle Constr., LLC*, 22 FMSHRC 9, 10 (Jan. 2000) (vacating default and remanding to judge where operator did not answer Secretary's petition or judge's show cause order based on its mistaken belief that it was excused from paying the civil penalties because it was in the process of closing); *Ogden Constructors, Inc.*, 22 FMSHRC 5, 7 (Jan. 2000) (remanding to a judge where operator failed to timely file contest because it mistakenly believed that proceeding was suspended while MSHA conducted investigation). If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring:

We would grant the operator's request for relief here, because the Secretary does not oppose and the operator has offered a sufficient explanation for its failure to timely respond. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Commission Procedural Rule 60(b), 29 C.F.R. § 2700.60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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